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Judgment Proofing the Profession

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Judgment Proofing The Profession

POONAM PURI*

In the law of business organizations, individuals have generally been unrestrained in choosing which legal form they will use to carry on productive endeavors. Professionals, however, have not been afforded such freedom. They have found themselves prohibited by their self-regulatory bodies from practicing their profession in a corporate form. As a result, members of professions have practiced either as sole practitioners or in partnership with other members of the same profession. Professionals practicing in partnership expose themselves to personal liability for the obligations of the partnership and wrongdoing by their partners. This Article analyzes the rise of limited liability partnerships (“LLPs”), a newly created form of business association that shields innocent partners from personal liability for the negligence of their partners, in the United States and Canada. Professor Puri argues that the development of LLPs has significant implications for the legal profession. First, the private benefits conferred upon lawyers by LLPs are at the expense of consumers of legal services, particularly unsophisticated consumers. Second, the benefits of LLPs will accrue disproportionately to partners in large law firms because the judiciary is more likely to pierce the LLP veil in the context of small law firms organized as LLPs, thereby creating a further divide between the two “hemispheres” of lawyers. Third, LLPs represent another step in the commercialization of the legal profession, suggesting that we ought to reflect on how to distinguish between the practice of law and the carrying on of other businesses, and re-evaluate the benefits associated with being members of a profession.

I. INTRODUCTION

In the law of business organizations, individuals have generally been unrestrained in choosing which legal form they will use to carry on productive

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endeavors. Professionals, however, have not been afforded such freedom. They have found themselves prohibited by their self-regulatory bodies from practicing their profession using a corporate form.¹ As a result, members of professions have practiced either as sole practitioners or in partnership with other members of the same profession. Professionals practicing in partnership expose themselves to personal liability for the obligations of the partnership and any wrongdoing by their partners.²

In the spring of 1998, Ontario became the first province in Canada to allow professionals to form limited liability partnerships ("LLPs"),³ a newly created form of business association.⁴ Almost every state in the United States has enacted LLP legislation,⁵ and LLP legislation has also recently been enacted in England.⁶ The distinguishing feature of LLPs is that innocent partners are shielded from personal liability for the negligence of their partners.⁷

This Article analyzes the development of limited liability partnerships for the legal profession. As recently as the late 1970s, accountants and lawyers had very little interest in gaining the advantages of limited liability.⁸ The legal profession's successful lobbying for LLPs was instigated by the changes in law firm organization and structure over the last several decades which make it difficult and inefficient for partners to monitor each other's activities as well as an increased fear by lawyers of burgeoning liability.⁹

The development of LLPs has several implications for the legal profession. First, the private benefits conferred upon lawyers by LLPs are at the expense of consumers of legal services, particularly unsophisticated consumers. While limited liability in the law firm may be justified on the basis of allocative efficiency, it has a non-negligible distributional impact. Second, the benefits of limited liability will accrue disproportionately to partners in large law firms because the judiciary is more likely to pierce the LLP veil in the context of smaller law firms organized as LLPs, thereby further separating the two

1. See J. Robert S. Prichard, *Incorporation by Lawyers*, in *LAWYERS AND THE CONSUMER INTEREST: REGULATING THE MARKET FOR LEGAL SERVICES* 303 (Robert G. Evans & Michael J. Trebilcock eds., 1982).

2. See generally JONATHAN R. MACEY & DETLEV F. VAGTS, *BASIC CORPORATION LAW* ch.2 (unpublished manuscript, on file with author).

3. Partnership Act, R.S.O., ch. P-5 (1990), amended by ch. 2, 1998 S.O.(Can.). The 1998 Amendment to the Partnership Act created LLPs.

4. The province of Alberta also recently passed LLP legislation, and other provinces are actively considering implementation of similar legislation. See *infra* note 20 and accompanying text.

5. All 50 states have modified their partnership statutes to permit general partnerships to register as LLPs. See J. William Callison & Allan W. Vestal, "They've Created a Lamb with Mandibles of Death": *Secrecy, Disclosure, and Fiduciary Duties in Limited Liability Firms*, 76 IND. L.J. 271, 313 n.2 (2001).

6. See Judith Freedman and Vanessa Finch, *Have Accountants Sewn up the Deep Pockets Debate?*, 1997 J. BUS. L. 387.

7. See *infra* Part II.D.

8. Prichard, *supra* note 1, at 303.

9. See discussion *infra* Part III.A.1.

“hemispheres” of lawyers.¹⁰ Third, LLPs represent another step in the commercialization of the practice of law, suggesting that we ought to re-evaluate the benefits associated with being members of a profession.

Part II of this Article explores the different methods used by lawyers to limit their liability. Part III conducts a policy analysis of limited liability in the law firm. Part IV provides an analysis of the legislative process through which LLP legislation was enacted in Ontario. Part V concludes that the private benefits conferred upon lawyers by LLPs are at the expense of consumers of legal services, particularly unsophisticated consumers.

II. TECHNIQUES USED BY LAWYERS TO LIMIT LIABILITY

In attempts to minimize the impact of partnership principles that impose unlimited personal liability on innocent partners in a partnership for the negligence of their co-partners, lawyers who practice in partnership with other lawyers have utilized techniques, such as the sheltering of assets and the formation of management corporations in order to avoid these legal rules. More recently, lawyers have lobbied to encourage the legislative creation of limited liability entities such as professional corporations (“PCs”) and LLPs. Part II sets out and evaluates the effectiveness of these techniques of limiting liability.

A. SHELTERING PERSONAL ASSETS

The simplest way for lawyers practicing in a partnership to avoid personal liability in the event that a successful lawsuit has been brought against one of their partners is to shelter their personal assets by ensuring that title to those assets is in the name of a trusted third party, such as a spouse or a child.¹¹

10. Heinz & Laumann have argued that there are two “hemispheres” of the legal profession – a corporate client hemisphere and a personal client hemisphere. JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (1982); see also Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953 (2000) (extending the ‘hemisphere’ paradigm to the Ontario legal market); John P. Heinz et al., *Lawyers and Their Discontents: Findings from a Survey of the Chicago Bar*, 74 IND. L.J. 735 (1999) (updating the 1982 study); John P. Heinz, Edward O. Laumann et al., *The Constituencies of Elite Urban Lawyers*, 31 LAW & SOC’Y REV. 441 (1997) (observing empirically characteristics of law firms in U.S. urban centers); Edward O. Laumann et al., *Washington Lawyers and Others: The Structure of Washington Representation*, 37 STAN. L. REV. 465 (1985) (exploring the ‘hemispheres’ in Washington).

11. See generally on judgment proofing K.E. Davis, *Vicarious Liability, Judgment Proofing and Non-Profits*, 50 U. TORONTO L.J. 407 (2000); Lynn M. LoPucki, *The Death of Liability*, 106 YALE L.J. 1 (1996) [hereinafter LoPucki, *Death of Liability*]; Steven L. Schwarcz, *The Inherent Irrationality of Judgment Proofing*, 52 STAN. L. REV. 1 (1999); Lynn M. LoPucki, *The Irrefutable Logic of Judgment Proofing: A Reply to Professor Schwarcz*, 52 STAN. L. REV. 55 (1999) [hereinafter LoPucki, *A Reply to Professor Schwarcz*]; Steven L. Schwarcz, *Judgment Proofing: A Rejoinder*, 52 STAN. L. REV. 77 (1999); Lynn M. LoPucki, *The Essential Structure of Judgment Proofing*, 51 STAN. L. REV. 147 (1998) [hereinafter LoPucki, *Judgment Proofing*]; Lynn M. LoPucki, *Virtual Judgment Proofing: A Rejoinder*, 107 YALE L.J. 1413 (1998) [hereinafter LoPucki, *Rejoinder*]; James L. White, *Corporate Judgment Proofing: A Response to Lynn LoPucki’s ‘The Death of Liability’*, 107 YALE L.J. 1363 (1998).

Typically, the successful plaintiff will first seek to recover from the partnership's insurer, and then from the assets of the partnership. If any remaining amount is owed, the plaintiff will look to the personal assets of each of the partners in the law firm; however, if each of the partners has successfully sheltered his or her personal assets, there will be few significant assets that can be seized to satisfy the plaintiff's judgment.

The benefit of this technique is that it is simple and involves minimal transaction costs. As long as it is engaged in sufficiently in advance of any lawsuit and is done without an intent to defraud creditors, it is unlikely that a successful plaintiff would be able to have the sheltering transaction set aside and thus gain access to the personal assets of the partnership's partners.¹² This technique is culturally accepted and widespread, not only in professional practice but also in other areas of productive activity where liability may be an issue.¹³ However, there is an obvious and substantial risk associated with using this technique: the third party who holds title to the property may not return it on demand, and it may be difficult to convince a court to assist in such a matter, since the lawyer would not be coming to the court with clean hands. As well, the recent rise of the two-professional household in which both members face unlimited personal liability limits the applicability of this technique, because holding title to assets in each other's names may not significantly reduce overall exposure to liability. Perhaps this fact partially accounts for the relatively recent lobbying for limited liability entities such as the LLP.

B. MANAGEMENT CORPORATIONS

The use of a management corporation is another technique used by lawyers practicing in a partnership to minimize the effects of unlimited personal liability.¹⁴ Despite its name, the basic feature of this structure is a requirement that the law firm carry on its activities as a partnership, as required by the jurisdiction's laws. A management company is incorporated, and voting shares are issued to the partners in the law firm, and non-voting shares may be issued to their spouses, children, or family trusts. The board of directors of the management corporation is comprised of the partners of the law firm.¹⁵

12. See generally Fraudulent Conveyances Act, R.S.O. 1990, c.F.29.

13. See Roger E. Meiners et al., *Piercing the Veil of Limited Liability*, 4 DEL. J. CORP. L. 351 (1979).

14. See generally L.R. Hayward, *Revising Washington's Corporate Practice of Medicine Doctrine*, 71 WASH. L. REV. 403 (1996); K.L. Levine, *Obtaining 501(C)(3) Status for Professional Medical Corporations*, 2 DEPAUL J. HEALTH CARE L. 231 (1998); S. Mars, *The Corporate Practice of Medicine: A Call For Action*, 7 HEALTH MATRIX 241 (1997).

15. The management company holds title to a substantial portion of the assets of the professional enterprise, including the long-term lease, the office furniture, and the computer hardware and software. The management company hires the non-lawyer employees such as secretaries, librarians, receptionists and computer support staff.

The relationship between the management corporation and the law partnership is purely contractual. The management corporation has a set of long-term contractual obligations with the law partnership. The management corporation sub-leases the premises, leases assets such as computer hardware and software, and supplies the law partnership with support staff in exchange for periodic payments for the provision of such services.

The law partnership hires the law associates and bills work to clients. The revenue is disbursed from the law partnership in a number of ways. A portion of the revenues is paid out to the professional employees (*i.e.*, associates in the law firm) in the form of salaries. A substantial portion of the revenue is paid out to the management corporation in the form of compensation for use of office space, use of assets and services rendered. Partners draw any remaining profits in the law partnership on a periodic basis. The management corporation receives its revenues, and after the payment of its expenses, distributes dividends to the shareholders on a frequent basis.

Two key benefits result from this structure. First, significant tax benefits may accrue to partners because they can split their incomes with spouses and children. Second and more important, the assets of the enterprise that remain in the management corporation are separated from the risk-generating aspects (*e.g.*, negligence claims) of the enterprise in the law partnership.¹⁶ Thus, if a claim is successfully made against the partnership for negligent work, there will be very few partnership assets to satisfy the claim, because the organization's most significant assets are shielded from recovery within the management corporation.¹⁷

Despite its benefits, use of the management corporation involves high transaction costs in setting up and maintaining the organizational structure. Additionally, the limitations of liability may not be airtight. Drawing an analogy to piercing the corporate veil in the context of parent-subsidary corporations, a court could pierce the management corporation's limited liability veil and allow the partnership's creditors to access the assets held by the corporation in an appropriate case.¹⁸

16. See LoPucki, *A Rejoinder*, *supra* note 11 at 1416-18; LoPucki, *A Reply to Professor Schwarcz*, *supra* note 11 at 51-63; LoPucki, *The Essential Structure of Judgment Proofing*, *supra* note 11 at 147; White, *supra* note 11 at 1366.

17. *Id.*

18. For a general discussion of piercing the corporate veil, see Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036 (1991); Robert B. Thompson, *Piercing the Veil Within Corporate Groups: Corporate Shareholders as Mere Investors*, 13 CONN. J. INT'L L. 379 (1999); Robert B. Thompson, *Unpacking Limited Liability: Direct and Vicarious Liability of Corporate Participants for Torts of the Enterprise*, 47 VAND. L. REV. 1 (1994) [hereinafter Thompson, *Unpacking Limited Liability*].

C. PROFESSIONAL CORPORATIONS

In the United States, lawyers and other professionals successfully lobbied state legislatures in the 1960s for the creation of a new form of business association known as the professional corporation.¹⁹ With the exception of the province of Alberta, the professional corporation as a form of business organization does not exist in Canada.²⁰ In a professional corporation jurisdiction, law firms that are carried on as partnerships can be converted into professional corporations, thereby gaining significant tax advantages and possibly limitations of liability. However, relatively few law firms in the United States have converted to professional corporations. Of the 250 largest firms in the United States, only nineteen are professional corporations.²¹ Fewer than 20 percent of New York City-based law firms listed in Martindale-Hubbell are professional corporations.²²

There are at least five explanations for the rare use of this form of business association. First, the limitations of liability are not airtight as lawyers had hoped.²³ Second, the tax advantages of the professional corporation over time have become negligible.²⁴ Third, there are significant up-front transaction costs associated with converting from a partnership to a corporation because of the fundamental differences in governance structure.²⁵ The use of the partnership form of business association does not require a written agreement (although most large law firms do have detailed partnership agreements), while certain documents must be created and filed to form a professional corporation. Fourth, there are continuing transaction costs associated with carrying on a practice using a professional corporation in comparison to a partnership. While a partnership involves no reporting requirements, use of a corporate form involves periodic filing and reporting requirements. Finally, lawyers are reluctant to change their

19. G.M. Giesel, *Corporations Practicing Law Through Lawyers: Why the Unauthorized Practice of Law Doctrine Should Not Apply*, 65 MO. L. REV. 151 (2000); H.B. Jones, *The Professional Corporation*, 27 FORDHAM L. REV. 353 (1958); Note, *Professional Corporations and Associations*, 75 HARV. L. REV. 776 (1962).

20. See Alberta Law Reform Institute, *Limited Liability Partnerships: Final Report*, 77 at 31-36 (1999) (discussing the creation of professional corporations in Alberta); D.J. Stratton & D.L. Hughes, *Case Comment: Canada (Attorney General) v. Roger M. Bourbonnais Professional Corporation*, 35 ALBERTA L. REV. 777, 781-82 (1997) (suggesting that the main reason for use of professional corporations in Alberta was taxation and not a concern about unlimited liability).

21. SUSAN SAMUELSON, *LAW FIRM MANAGEMENT: A BUSINESS APPROACH* § 2.24 (1994).

22. See Martindale-Hubbell, at <http://www.martindale.com> (last visited Apr. 5, 2001).

23. The shareholders of a professional corporation generally have unlimited liability for the obligations of the business.

24. Ronald J. Gilson, *Unlimited Liability and Law Firm Organization: Tax Factors and the Direction of Causation*, 2 J. POL. ECON. 420, 425 n.10 (1991).

25. See generally Larry E. Ribstein, *Changing Statutory Forms*, 1 J. SMALL & EMERG. BUS. L. 11 (1997); Larry E. Ribstein, *Choosing Law by Contract*, 18 J. CORP. L. 245 (1993); Larry E. Ribstein, *Linking Statutory Forms*, 58 LAW & CONTEMP. PROBS. 187, 187-200 (1995); Larry E. Ribstein, *Statutory Forms for Closely Held Firms: Theories and Evidence from LLCs*, 73 WASH. U. L.Q. 369 (1995).

organizational structure from that of a partnership to a corporation for psychological reasons. Lawyers are reluctant to see their partners become their co-shareholders. "Making shareholder" does not appear to have the same significance as "making partner." There is a sharp symbolic difference between a partnership and a corporation. While the partnership connotes collegiality and teamwork, the corporation connotes pure profit motive, which is an image that lawyers as professionals are reluctant to openly embrace.

D. LIMITED LIABILITY PARTNERSHIPS

Most recently, lawyers have lobbied successfully to limit their liability through the adoption of LLP legislation. LLP legislation was first enacted in Texas in 1991 as a result of intense lobbying by the legal profession that was faced with lawsuits arising from the savings and loan crisis.²⁶ Other states followed with similar legislation, with the result that almost all states now have some form of LLP legislation.²⁷ In 1998, Ontario became the first province in Canada to pass LLP legislation.²⁸ In 1999, Alberta became the second province and other provinces are seriously considering its implementation.²⁹ England has also adopted a form of LLP legislation.³⁰

The first wave of LLP statutes enacted in the United States shielded innocent partners from personal liability resulting from the negligence of their partners.³¹ However, partners remained personally liable for their own negligence as well as for the negligence of anyone under their supervision or control.³² Additionally, all partners in the partnership remained personally liable for liabilities arising from contractual breaches and claims based on theories other than negligence.³³ Texas and Delaware were the first states to enact statutes with these limitations of liability.³⁴

The second wave of LLP statutes created much broader liability shields by granting, in addition to the "innocent partner" liability shield described above, full protection from other liabilities.³⁵ Thus, partners in a second wave LLP are no longer personally liable when their partnership, for example, breaches an improvident lease. Minnesota was the first state to enact this form of LLP

26. For a history of the enactment of LLP legislation, see Robert W. Hamilton, *Registered Limited Liability Partnerships: Present at the Birth (Nearly)*, 66 U. COLO. L. REV. 1065, 1066-74 (1995).

27. See generally ALAN R. BROMBERG & LARRY E. RIBSTEIN, BROMBERG & RIBSTEIN ON LIMITED LIABILITY PARTNERSHIPS AND THE REVISED UNIFORM PARTNERSHIP ACT (2000).

28. See Partnership Act, R.S.O., ch. P-5 (1990), amended by ch. 2, 1998 S.O.(Can.).

29. See Partnership Act, R.S.A., ch. P-2, §79 (1980) amended by S.A., ch. 27, § 8 1999 (Can.).

30. See Finch & Freedman, *supra* note 6, at 387.

31. BROMBERG & RIBSTEIN, *supra* note 27, at 22.

32. *Id.* at 23.

33. *Id.*

34. *Id.* at 24.

35. *Id.*

statute.³⁶

The LLP legislation passed in Ontario follows the first wave of LLP statutes passed in the United States. In Ontario, innocent partners are shielded from debts or obligations arising out of "negligent acts or omissions" of their partners.³⁷ Partners still remain personally liable for their own negligence as well as the negligence of anyone under their "direct supervision or control."³⁸ The formal requirements to convert from a general partnership to an LLP are minimal. The law firm must register the LLP under the *Ontario Business Names Act* and with the Law Society of Upper Canada ("Law Society"), the self-regulatory body for lawyers in Ontario.³⁹ Under Ontario's LLP legislation, the only form of mandatory notice to third parties is a requirement that the firm include the letters LLP after the firm's name.⁴⁰ The Law Society has imposed an additional requirement that existing clients must also be sent a letter advising them of the change to an LLP, but a law firm can satisfy this requirement by placing an advertisement in a local newspaper.⁴¹ A final requirement is that a law firm converting to an LLP must comply with minimum mandatory insurance requirements set out by the Law Society.⁴²

III. POLICY ANALYSIS OF LIMITED LIABILITY IN THE LAW FIRM

Limited liability for shareholders is considered a fundamental characteristic of the corporation. It is deeply embedded in our legal and social culture.⁴³ However, limited liability did not always co-exist with the corporate form of business association.⁴⁴ It was introduced into the corporate form in England in the nineteenth century with much debate and controversy.⁴⁵ Michael Smart has noted that limited liability did not spread rapidly in England, in part because companies that opted for it were signaling to the market that they were engaged in high-risk activities.⁴⁶ In North America, American Express was until as recently as the

36. *Id.*

37. See Partnership Act, R.S.O., ch. P-5 (1990) amended by S.O., ch.2, §10(2) 1998 (Can.).

38. *Id.* § 10(3).

39. See *id.* §§ 44.2 and 44.3(1).

40. See *id.* § 44.3(3).

41. Law Society of Upper Canada Bylaw 26, §§ 2(1) and 2(2).

42. See Partnership Act, R.S.O., ch. P-5 (1990) (Ont.), as amended by S.O., c.2, §44.2(b). Law Society of Upper Canada Bylaw 26, § 1 establishes the minimum insurance required by a law firm practicing as an LLP to be "the coverage now maintained individually by each member who is a partner of the firm. This is currently in the amount of \$1,000,000 per member." Note that minimum mandatory liability insurance is not a requirement for the practice of law in most American jurisdictions. See *infra* Part III.C.3.

43. See LoPucki, *A Reply to Professor Schwarcz*, *supra* note 11, at 4.

44. See, e.g., Paul Halpern et al., *An Economic Analysis of Limited Liability in Corporation Law*, 30 U. TORONTO L.J. 117 (1980); Teresa A. Gabaldon, *The Lemonade Stand: Feminist and Other Reflections on the Limited Liability of Corporate Shareholders*, 45 VAND. L. REV. 1387 (1992).

45. Robert W. Hillman, *Limited Liability in Historical Perspective*, 54 WASH. & LEE L. REV. 615 (1997).

46. Michael Smart, University of Toronto Faculty of Law Working Paper (1996) (on file with author).

mid-1950s a publicly traded corporation with unlimited liability for its shareholders.⁴⁷ This part of the Article analyzes the policy arguments in favor of limited liability in the law firm, implications for consumers and other third parties, and effects on internal dynamics within the law firm.

A. ARGUMENTS IN FAVOUR OF LIMITED LIABILITY IN THE LAW FIRM

1. MONITORING

A key argument in favor of limited liability in the law firm is that traditional general (*i.e.*, unlimited) partnerships unfairly impose personal liability on innocent partners who had no power to prevent any wrongdoing, especially given the organizational changes that have taken place in law firms over the last several decades.

Four organizational changes, in particular, play into the inability to monitor argument. First, law firms have experienced tremendous growth in recent years. The exponential growth of large, elite law firms has been well documented.⁴⁸ The argument is that partners in a several-hundred-lawyer firm are unable to effectively monitor their partners' work. The globalization of law practice, which has also been well documented, is another factor at play.⁴⁹ The argument is that a partner in the New York office of a law firm with a global presence cannot effectively monitor a partner in the Hong Kong office and therefore ought not to be personally liable for his or her negligence. An argument along a similar vein relates to the increased specialization in the practice of law.⁵⁰ It is unfair, for

47. See P.Z. Grossman, *The Market for Shares of Companies with Unlimited Liability: The Case of American Express*, 24 J. LEGAL STUD. 63 (1995).

48. See generally, MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* (1991); ROBERT L. NELSON, *PARTNERS WITH POWER: SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM* (1988); Ronald J. Daniels, *Growing Pains: The Hows and Whys of Law Firm Expansion*, 43 U. TORONTO L.J. 147 (1993); Ronald J. Daniels, *The Law Firm as an Efficient Community*, 37 MCGILL L.J. 801 (1992); see also L.E. Gasey, *Big Firms' Hiring Surges as Business Booms*, CHI. LAW., Feb. 1998, at 40-41 (stating that "25 of Chicago's 26 largest firms show[ed] gains of from 14 to 19 percent in their Chicago and suburban offices"); David Marcus, *Ain't No Time for the Summertime Blues*, AM. LAW., June 1998, at 17-18 (stating that six of the ten highest-grossing U.S. firms hired their largest classes of summer associates ever in 1998).

49. See also Carlyn Kolker & A.J. Noble, *A World of Lawyers*, AM. LAW., Nov. 1998, at 53-54 (projecting that protocols on interjurisdictional law firms developed by the Federation of Law Societies may be the first step in permitting the globalization of the Canadian legal market); Aric Press, *We're all Connected*, AM. LAW., Nov. 1998, at 6-8 (discussing efforts under way to increase international law teaching, leading to a so-called "golden era"); *The Legal Profession: The World Is Their Oyster*, THE GLOBE & MAIL, Aug. 21, 1998, at C3 (stating that Canadian firms are increasingly becoming globalized in order to meet their client needs); J. Mitchell, *The Firm*, THE GLOBE AND MAIL, Nov. 27, 1997, at A1 (stating that the legal profession is headed towards the establishment of "a small clutch of mega-firms [that] hog the transnational business").

50. *New Practice Areas Are Important to Law Firm Growth*, ILL. LEGAL TIMES, Nov. 1990, at 18 ("The only way law firms can protect their market share is by specializing."); M. France, *It's Hot, Tax is Not, in Mid-90s Practice*, NAT'L L.J., Feb. 26, 1996, at A1 (noting that while the areas of specialization change to meet the demands of clients, specialization is necessary for large firms); A. Ward, *Griping Isn't Good Strategy*:

example, to impose liability on a partner in a law firm who practices tax law for the negligence of a partner who practices intellectual property law, since the tax partner cannot effectively monitor the intellectual property partner. Supporters of LLP legislation argue that while general partnership liability may have been suitable in an era when lawyers were generalists, they are no longer appropriate in the age of specialization. A fourth factor playing into the monitoring argument relates to the increased interest in multi-disciplinary firms.⁵¹ An innocent partner from one professional discipline should not be held personally liable for the negligence of a partner belonging to another professional discipline. In particular, a key concern relates to the possibility that innocent law partners may be held liable for the negligence of their potential auditing partners, who face much higher risks of liability.

The arguments presented in favor of LLPs all center around the difficulty of monitoring one's partners, given the organizational changes that have taken place in big law firms. These changes, however, are the consequences of voluntary choices made by partners in law firms to organize within the firm rather than across markets.⁵² As Professor Charles Wolfram put it, these are "self-inflicted wounds."⁵³ Instead of contracting out work to contract lawyers, partners in law firms decided it was more efficient to expand internally by hiring more attorneys. Instead of contracting out work to foreign law firms when doing international work, partners in law firms decided it was more efficient (for goodwill or quality control reasons) to set up their own branch offices in foreign cities. Similarly, rather than remaining generalists, partners in law firms decided to take advantage of the efficiencies of specialization. These choices brought with them tremendous advantages but also come with certain costs. It is difficult to accept the argument that lawyers should be allowed to reap the tremendous benefits while avoiding the costs that are associated with these changes in law firm organization and structure.

Specialization, Organization are Best Weapons Against Accounting Firms, TEX. LAW., Feb. 1999, at 19 (observing that law firms must be more specialized in order to compete with accounting firms); Tom Schoenberg, *How to Grow by Acquisition*, LEGAL TIMES, June 29, 1998, at S38-39 (reporting that one of Chicago's top law firms is succeeding because it strategically recruited for highly specialized practice areas).

51. See ABA Final Report to the House of Delegates on Multi-Disciplinary Firms (August 1999); *The "Futures" Task Force - Final Report of the Working Group on Multi-Disciplinary Partnerships*, Law Society of Upper Canada (Sept. 25, 1998), at <http://www.lsuc.on.ca/services/MDPOct98.pdf> (last visited Sept. 26, 2001); see also John Quinn, *Multidisciplinary Legal Services and Preventive Regulation*, in *LAWYERS AND THE CONSUMER INTEREST: REGULATING THE MARKET FOR LEGAL SERVICES*, *supra* note 1, at 329; Michael Trebilcock & Lisa Csorgo, *Multi-Disciplinary Professional Practices: A Consumer Welfare Perspective* (September 25, 1999) (unpublished manuscript, on file with author).

52. See WILLIAM A. KLEIN & JOHN C. COFFEE JR., *BUSINESS ORGANIZATION AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES* (2000); Daniels, *The Law Firm as an Efficient Community*, *supra* note 48, at 813.

53. Charles W. Wolfram, *Inherent Powers in the Crucible of Lawyer Self-Protection: Reflections on the LLP Campaign*, 39 S. TEX. L. REV. 359, 367 (1998).

2. LIABILITY CRISIS

Proponents of limited liability in the law firm also argue that lawyers are facing a liability crisis, particularly because plaintiffs have an incentive to sue those with significant assets. While this phenomenon was manifest in the suits brought against law firms in relation to the savings and loan crisis in the United States,⁵⁴ it cannot be said that a similar trend has been witnessed in Canada. The successful lobbying for legislation creating LLPs in Canada may be seen as a pre-emptive strike by the legal profession to avoid burgeoning liability.

The concern about a liability crisis seems to emanate from the fact that plaintiffs, knowing that defendants will be held jointly and severally liable for any loss, will name as many defendants as possible, and particularly those with "deep pockets." Under a rule of joint and several liability, lawyers are exposed to significant personal liability when practicing in law firms organized as general partnerships even if their law firm's role in a particular transaction is minimal relative to the involvement of other defendants. If this characterization were correct, then a more finely tuned legislative response than LLPs would be to replace the rule of joint and several liability among defendants with a rule of proportionate liability.⁵⁵

3. RAISING CAPITAL FROM PASSIVE INVESTORS

A general argument in favor of limited liability is that it facilitates the raising of capital and the efficient functioning of public capital markets.⁵⁶ Prospective investors are more likely to invest when their exposure to liability is limited to their capital investment in the business. However, law firms have historically not been capital-intensive enterprises; they have, and continue to be, labor intensive. The rise of multi-disciplinary firms may create a greater need for capital, and it may be necessary for law firms to attract outside capital from passive investors.⁵⁷ A rule of unlimited liability would result in a non-uniform share price: the value of each investor's shares would be based on, among other things, their wealth as well as the wealth of other investors,⁵⁸ whereas a rule of limited liability would

54. See Robert W. Hamilton, *Registered Limited Liability Partnerships: Present at the Birth (Nearly)*, 66 U. COLO. L. REV. 1065, 1066-74 (1997).

55. Auditors in Canada are currently lobbying for replacement of the rule of joint and several liability with a rule of proportionate liability. See Canada, Legislative Assembly, Senate Committee on Banking, Trade and Commerce (1998).

56. See EASTERBROOK & FISCHEL, *THE STRUCTURE OF CORPORATE LAW* 40-62 (Harvard University Press 1991).

57. See generally E.S. Adams & J.H. Matheson, *Law Firms on the Big Board?: A Proposal For Non-Lawyer Investment in Law Firms*, 86 CAL. L. REV. 1 (1998).

58. See EASTERBROOK & FISCHEL, *supra* note 56, at 40-62.

allow for a uniform share price and a more liquid trading market.⁵⁹

4. FAIRNESS

A fourth argument in favor of limited liability for partners practicing in law firms relates to the principle of fairness. It is simply unfair for lawyers to be subject to unlimited personal liability but shareholders, managers and employees of businesses organized as corporations to have the benefit of limited liability. For example, most of a law firm's business clients are organized as corporations as are many of a law firm's counterparts and competitors (such as investment banks and venture capitalists).⁶⁰ The shareholders, managers and employees of such businesses have the advantage of limited personal liability for any liabilities or obligations of the corporation. On the issue of monitoring, an analogy can be drawn between partners in a large law firm and corporate officers and directors who hold shares in the corporations they manage. Corporate managers who are often minority shareholders do not expose themselves or other managers to personal liability when they make decisions on behalf of the corporation; when their actions result in injury or harm to third parties, generally speaking, only the corporation is liable.⁶¹

The rule requiring lawyers to practice either as sole-practitioners or in a general partnership with other lawyers seems tied to an attempt that has long been made—often unsuccessfully—to distinguish the practice of law from the carrying on of a business.⁶² The rhetoric suggests that while a business is carried on purely for a profit motive, the practice of law involves something above and beyond concern for the bottom line.⁶³ This distinction is not easily justifiable given the nature of the practice of law in contemporary times. There exists a dichotomy between professional ideology and self-portrayal as a non-business and the reality that a law firm, particularly a large law firm, is a business.⁶⁴ Given the growth of the big law firm in recent decades, it seems that such firms are not significantly different from investment banks or consulting firms in terms of organizational structure and how they are run. Profit-maximization is a central goal, despite images to the contrary that are presented and promulgated by big

59. See LEWIS D. SOLOMON & ALAN P. PALMITER, *CORPORATIONS* 70 (2d ed. 1994) (noting that limited liability exists because it facilitates public stock trading markets).

60. See EASTERBROOK & FISCHEL, *supra* note 56, at 40-62.

61. Cf. Thompson, *Unpacking Limited Liability*, *supra* note 18, at 6 (noting the reach of liability differs as among shareholders, officers, and directors in different contexts).

62. See generally Richard Abel, *The Decline of Professionalism*, 49 MOD. L. REV. 1 (1986); Robert Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988); Deborah Rhode, *The Professionalism Problem*, 39 WM. & MARY L. REV. 283 (1998).

63. See Rhode, *supra* note 62, at 298.

64. See GALANTER & PALAY, *supra* note 48, at 12; ROBERT L. NELSON ET AL., *LAWYERS' IDEALS/LAWYERS PRACTICES: TRANSFORMATIONS IN THE LEGAL PROFESSION* (Cornell University Press 1992).

law firms in the public sphere.⁶⁵ Why else would the *American Lawyer* annually publish a list of the top one hundred law firms in the United States by revenues, profits per partner, and other measures of monetary well-being?⁶⁶ As well, given the type of work done by corporate lawyers in large firms, it seems that much of their practice is no more closely related to the values of the justice system than the work of a corporate lawyer's close substitutes, the investment banker or management consultant. Moreover, many of the services performed by corporate law firms are non-legal and non-advisory in nature and could be performed by non-lawyers.⁶⁷

If the practical distinction between a profession and a business cannot be justified, then it seems that there is little reason to the rule prohibiting lawyers from practicing using a corporate form or from forming LLPs. The rise of limited liability in the law firm may be recognition that law practice is a business and is exposed to the risks of liability not unlike other businesses; as a result, it is simply unfair that law firms are not treated like other businesses.

However, the fairness argument also cuts the other way. If the distinction between law and business cannot be justified, it seems then we need to re-examine and re-evaluate whether lawyers ought to be afforded the privileges (*i.e.*, prestige, self-regulation, etc.) associated with being members of a profession.

The fact that legislatures were unwilling to create a wholesale limitation of liability for lawyers by allowing them to incorporate or by creating LLPs that provided a fuller shield from personal liability, and instead found a middle ground by creating some protection from personal liability under the LLP form of business association may have been the legislature's validation of some of the arguments that have historically distinguished the practice of law from other productive profit-seeking activities. Or instead, perhaps the self-regulatory organizations for lawyers simply were not confident that they could successfully make the more difficult case for allowing lawyers to practice using corporations.

65. For example, on its website, the New York based law firm of Skadden, Arps, Slate, Meagher & Flom emphasizes its "commitment to public service" and highlights its involvement in a "wide variety of charitable endeavors." See <http://www.skadden.com/sitePage.ihtml?URL=communityInvolvement.ihtml> (last visited Sept. 26, 2001). The firm also publicizes the Skadden Fellowship Foundation, "which annually provides two-year fellowships to at least 25 very talented young lawyers so that they may pursue the practice of public interest law on a full-time basis." See <http://www.skadden.com/sitePage.ihtml?URL=communityFellowship.ihtml> (last visited Sept. 26, 2001).

66. Robert Gordon, *Can Lawyers' Professional Values Be Saved? Are They Worth Saving?*, (Preliminary Draft of Lecture Given at the University of Toronto, Faculty of Law, September 23, 1999, on file with author).

67. See Poonam Puri, *Taking Stock of Lawyers Taking Stock as Legal Fees*, 87 CORNELL L. REV. 99 (2001) [hereinafter Puri, *Taking Stock of Taking Stock*]; Poonam Puri, *Financing Litigation by Third-Party Investors: A Share of Justice*, 36 OSGOOD HALL L.J. 515, 522 (1998); Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 295 (1984).

B. EFFECT OF LLPS ON THE INTERNAL DYNAMICS WITHIN THE LAW FIRM

1. INCREASED RISK OF NEGLIGENT WORK

An argument against limited liability in the law firm is that it may encourage excessive risk-taking by partners. In the context of LLPs, the argument is that partners in law firms organized as LLPs will take less care in performing their work. However, this argument is negated by the fact that a partner in an LLP law firm is shielded only from the negligence of co-partners;⁶⁸ he or she remains personally liable for his or her own negligence and the negligence of anyone under his or her direct supervision or control.⁶⁹ Thus, partners will continue to have the proper incentives to take care when performing their own work and to effectively supervise associates under their direct supervision or control.

2. MANAGEMENT AND SUPERVISORY CHILL

Will partners in law firms organized as LLPs be chilled from taking on management and supervisory roles because doing so may expose them to a greater risk of personal liability? For example, a junior partner and two associates work on a initial public offering for a client; the client sues on the basis that the associate was negligent in performing legal work; will the partners on the opinion review committee who reviewed the opinion drafted by the associate be personally liable if the client sues for negligence? Will the partners on the firm hiring committee who hired the associate be personally liable? Will the partners on the firm's management committee that is responsible for setting firm policies and procedures be personally liable? Will the possibility of liability result in an *ex ante* chill on accepting management positions within the law firm? Responses to these questions will depend upon the interpretation of the phrase "direct supervision and control"⁷⁰ for which there is generally no legislative definition and very little judicial guidance.⁷¹ It is unlikely, however, that a broad interpretation of "direct supervision and control" will create incentives for partners to avoid supervisory or senior management positions within the law firm because the benefits that arise from their enhanced reputation will likely outweigh liability concerns.

3. PARTNERSHIP ASSETS AND THE EFFECT ON DRAWS

The conversion by a law firm from a general partnership to an LLP will likely affect the internal dynamics in relation to partners' draws. The issue of personal

68. See Partnership Act, R.S.O., ch. P-5 (1990) (Ont.), as amended by S.O., ch. 2, §10(2) (1998) (Ont.).

69. See *id.* at §10(3) (1998) (Ont.).

70. Partnership Act, R.S.O., ch. P-5 (1990) (Ont.), as amended by S.O., ch. 2, §10(3) (1998) (Ont.).

71. A search on Westlaw in the CAN-ALLCASES database using the phrase "direct supervision and control" came up with less than 20 cases. Thus, there is very little judicial guidance and none of it is particularly relevant, helpful or interesting.

liability of partners only arises after partnership assets and liability insurance have been exhausted.⁷² A key partnership asset in most law firms is the monies received from clients for services rendered. Since law firms are not capital intensive and thus do not need to retain their profits for reinvestment, profits are generally drawn by the partners on a regular basis. In the face of an on-going negligence lawsuit, negligent partners will have an incentive to retain as much of the profits in the firm while non-negligent or innocent partners will have an incentive to draw as much as possible from the firm. Unlike in the general partnership context where liability rules encourage partners to “sink or swim together,” partners in law firms organized as LLPs have divergent incentives based on their differing liability status.

4. ABANDONING TEAMWORK AND COLLEGIALLY FOR INDIVIDUALISM

Law firms have traditionally prided themselves on teamwork and collegiality.⁷³ However, it seems that recent changes in law firms’ structure and organization, ranging from compensation trends to legal forms of organization, result in a move away from the collective and toward the individual.⁷⁴ While lockstep compensation systems were at one time the norm in compensation for partners at law firms, compensation tied to performance based on the “eat what you kill” philosophy is a much more apt description of compensation norms and trends at most North American law firms today.⁷⁵ Similarly, the conversion of law firms to LLPs suggests that even partners practicing at large law firms are very similar to sole-practitioners in terms of their liability status, again reflecting a triumph of the individual over the collective.⁷⁶ In fact, the two trends may be related. As a general matter, it appears that firms that have converted to LLPs also have compensation systems that are tied to performance while firms that remain general partnerships also compensate their partners on the basis of a lock-step system.⁷⁷

72. See *infra* Part III.C.3.

73. McMillan Binch’s website advertises that the firm continues to build a “collaborative work environment by providing opportunities for growth through delegation, sharing information and experience, relying on each other’s expertise, keeping commitments and trusting each other.” See http://www.mcbinch.com/About/core_values/ (last visited Sept. 26, 2001). Similarly, Sullivan & Cromwell’s website states that the firm places an “emphasis on teamwork which allows [them] to utilize all of the resources of the firm.” See http://www.sullcrom.com/display.asp?section_id=5 (last visited Sept. 26, 2001).

74. On compensation trends, see Ronald J. Gilson & R.H. Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits*, 37 STAN. L. REV. 313, 313-40 (1985).

75. *Id.*

76. See generally *id.* at 333.

77. See generally Karl S. Okamoto, *Reputation and the Value of Lawyers*, 74 OR. L. REV. 15, 41-42 (1994).

B. IMPLICATIONS OF LLPS FOR CONSUMERS AND OTHER THIRD PARTIES

1. TRANSFER OF RISK OF LOSS TO CONSUMERS OF LEGAL SERVICES

Limited liability allows the owners of an enterprise to avoid bearing the risk of loss if the enterprise is unable to pay its liabilities.⁷⁸ But, the risk of loss does not disappear. It is transferred to those who deal with the enterprise.⁷⁹ Customers, lenders, suppliers, employees, and tort victims must bear that risk.

One line of economic analysis argues that the issue of limited versus unlimited liability is overstated, if not irrelevant.⁸⁰ A change from a rule of unlimited liability to limited liability is a zero sum game.⁸¹ The benefits of limited liability to corporate shareholders are exactly offset by the detriment to creditors of the corporation.⁸² The benefit to shareholders in terms of a reduction in risk is offset by the increase in the cost of capital that will be demanded by creditors to compensate them for bearing additional risk. Thus, the firm's cost of capital is the same under both liability regimes.

A second line of analysis suggests that limited liability is not a zero sum game but leads to efficient outcomes. The theory is that creditors are better bearers of risk than shareholders because they have relatively lower monitoring, information, and co-ordination costs relative to shareholders.⁸³

A third line of analysis suggests that limited liability is inefficient because certain creditors are unable to protect themselves. They are unable to adjust their cost of capital to reflect the additional risk they bear.⁸⁴

In analyzing the efficiency of limited liability, the law and economics literature sub-divides creditors into voluntary and involuntary creditors. It is generally settled among law and economics scholars that limited liability is efficient in relation to voluntary creditors because they can protect themselves.⁸⁵ They have the ability to negotiate the terms of credit and engage in monitoring. Easterbrook and Fischel write: "Employees, consumers, trade creditors, and lenders are voluntary creditors. The compensation they demand will be a function of the risk they face."⁸⁶

In contrast, law and economics scholars have been vigorously debating the normative wisdom of limited liability in the context of involuntary creditors.

78. See EASTERBROOK & FISCHEL, *supra* note 56, at 40-62.

79. See *id.*

80. See Roger E. Meiners et al., *Piercing the Veil of Limited Liability*, 4 DEL. J. CORP. L. 351 (1979).

81. See *id.*

82. See Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 98 (1985).

83. See *id.* at 98-101.

84. See EASTERBROOK & FISCHEL, *supra* note 56, at 56, 58; Halpern et al., *supra* note 44, at 117.

85. See EASTERBROOK & FISCHEL, *supra* note 56, at 57; Henry Hansmann & Reinier Kraakman, *Towards Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879 (1991); David W. Leebron, *Limited Liability, Tort Victims, and Creditors*, 91 COLUM. L. REV. 1565 (1991); Halpern et al., *supra* note 44, at 118.

86. See EASTERBROOK & FISCHEL, *supra* note 56.

Hansmann and Kraakman,⁸⁷ and Leebron⁸⁸ make a strong case for unlimited shareholder liability for torts committed by the corporation. The literature suggests that limited liability may not be efficient in the context of involuntary creditors such as tort victims because they do not have the opportunity to negotiate the terms of credit and engage in effective monitoring of a corporation's activities.⁸⁹

This Article concludes that a rule of limited liability in the context of legal services may not be efficient. The law and economics literature regards consumers as voluntary creditors and assumes that they have the knowledge and bargaining power to make rational risk-return calculations. These assumptions may be invalid in the context of consumers of legal services. Even if a case can be made that a rule of limited liability is allocatively efficient, the distributional effect of the rule is clear: limited liability results in an uncompensated transfer of wealth from consumers of legal services to their lawyers.

The nature of legal services is such that there is an information asymmetry between the provider and the consumer of legal services about the quantity, quality and price of legal services.⁹⁰ Even after legal services have been provided, a client is generally not in a position to assess whether he or she was reasonably billed and whether the services were well-performed.⁹¹

As a general matter, it is difficult for any consumer of legal services to evaluate the quality and cost of legal services. Nonetheless, consumers of legal services can be placed along a spectrum with respect to sophistication in terms of their ability to monitor quality and price. More sophisticated consumers may have some ability to effectively monitor the quality and price of services being offered. They may be repeat users of a particular legal service or law firm.⁹² Corporate clients, particularly those with in-house counsel, would be included on this end of the spectrum.⁹³ In contrast, unsophisticated consumers are those who cannot effectively monitor the price and quality of legal services because they are one-shot or infrequent users of legal services.

Liability of partners in a law firm only becomes relevant when a plaintiff's judgment exceeds the sum of any insurance coverage taken out by the law firm and the value of the partnership's assets. It is only after these assets have been

87. See Hansmann & Kraakman, *supra* note 85.

88. See Leebron, *supra* note 85.

89. See Thompson, *Unpacking Limited Liability*, *supra* note 18.

90. This information asymmetry provides a justification for the regulation of the professions. See generally Hayne E. Leland, *Quacks, Lemons, and Licensing: A Theory of Minimum Quality Standards*, J. POL. ECON. 1328 (1979); Avner Shaked & John Sutton, *The Self-Regulating Profession*, 48 REV. ECON. STUD. 217 (1981).

91. See Puri, *Taking Stock of Taking Stock*, *supra* note 67, at 128; Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953 (2000).

92. See Puri, *Taking Stock of Taking Stock*, *supra* note 67, at 128; Hadfield, *supra* note 91.

93. See Nancy J. Moore, *Conflicts of Interest for In-House Counsel: Issues Emerging From the Expanding Role of the Attorney-Employee*, 39 S. TEX. L. REV. 497, 499 (1998).

exhausted that a plaintiff may seek to recover against the personal assets of partners.

Under liability rules for firms organized as general partnerships, all partners, including all non-negligent partners, are personally liable to a plaintiff.⁹⁴ Under liability rules for firms organized as LLPs, the partner who performed the negligent work remains personally liable to the consumer of legal services, similar to the liability rule for general partnerships.⁹⁵ However, the non-negligent partners in the firm are not personally liable to the plaintiff and their assets are not available for recovery by the plaintiff.⁹⁶ Thus, LLPs result in consumers of legal services bearing a greater risk of loss if legal work is negligent and if their law firm's liability insurance and partnership assets are insufficient to cover the loss.

Given the change in liability rules, one should find that in a competitive market, the hourly billing rates of partners and associates at law firms that have converted to LLPs should have (automatically) decreased commensurate with the decrease in risk-bearing by the law firm. Anecdotal evidence suggests otherwise; law firms that have converted to LLPs have not adjusted their hourly billing rates downward to reflect the reduced risk they bear.

Given that law firms that have converted to LLPs have not automatically reduced their billing rates, savvy consumers of legal services have two choices *ex ante*. First, they can negotiate a reduction in the price of the services because they face a greater risk of loss in the event that the services performed are negligent. Alternatively, they can contract around the default limited liability rule and demand that the other partners in the firm sign guarantees that they will be personally liable in the event that the partner performing the work is negligent.

It is unlikely that unsophisticated consumers will be able to effect the results envisioned by the economic model outlined above. Unsophisticated consumers may not have the knowledge to even consider engaging in any negotiation with their legal service provider. While LLP legislation generally requires the letters "LLP" to be included after the firm name, this is the only form of notice mandated by the Ontario legislation.⁹⁷ It is doubtful that unsophisticated consumers will be aware of or understand the changes in liability rules that result from these three additional letters after a firm name. If this is correct, then unsophisticated consumers will not even consider discussing the issue of liability with their lawyer.

Even assuming that an unsophisticated consumer recognizes the meaning of the letters "LLP" and raises the issue with his or her lawyer, it is unlikely that the

94. See generally Jonathan R. Macey & Detlev F. Vagts, Basic Corporation Law Ch.2 (unpublished manuscript, on file with author).

95. See Meiners et al., *supra* note 80.

96. See *id.*

97. See *supra* notes 39-41. The self-regulatory bodies for lawyers in some jurisdictions require the law firm to notify existing clients. See, e.g., Law Society of Upper Canada Bylaw 26 § 2.

potential client will have the bargaining power to negotiate a lower price or get the other partners in the law firm to sign personal guarantees. Since the unsophisticated consumer is only a one-shot or infrequent user of legal services, the lawyer loses very little by playing hardball.

It is true that the legal services required by unsophisticated consumers will be of a more routine nature and will involve smaller amounts of money. As a result, it would seem that any potential negligence claim by an unsophisticated consumer would generally be covered by the law firm's insurance. However, it is possible that an aggregate of claims by unsophisticated consumers of legal services, in the context of a class action, for example, would exceed the firm's insurance coverage and partnership assets. In these cases, the issue of limited versus unlimited liability for the firm's non-negligent partners would be very important.

In comparison, sophisticated consumers of legal services may have the requisite knowledge to recognize the change in liability that results from the use of the letters "LLP" after a law firm's name.⁹⁸ After recognizing this change, sophisticated consumers may also have greater bargaining power to obtain a reduction in price or obtain personal guarantees from the other partners in the firm because a law firm is more likely to negotiate and compromise with its sophisticated consumers if they provide large or steady streams of income. However, even sophisticated consumers may not have sufficient bargaining power to convince a law firm to reduce its price.⁹⁹

2. NOT ALL CONSUMERS ARE CLIENTS AND NOT ALL CLAIMS ARE BASED IN NEGLIGENCE

It is important to note that the first wave of LLP legislation disproportionately impacts consumers of legal services who are not clients. Clients may be able to pursue simultaneous causes of action in negligence and contract for harm caused to them by faulty legal work. For a claim based in negligence, the LLP shield will only allow a client to recover from the negligent partner(s). However, a client can recover from the personal assets of all the partners in the law firm for a claim based on a breach of contract theory. Thus, LLP status does not necessarily have a practical impact on the ability of clients to recover from the personal assets of partners. In fact, it creates incentives for clients to frame causes of action in contract rather than negligence.

However, many individuals or entities that consume a law firm's legal services are not "clients" in a legal sense. They may use and rely on a law firm's work

98. *Id.*

99. However, even they may have little or no bargaining power to refuse to sign a blanket prospective waiver of future conflict of interest when retaining some elite U.S. law firms. See Lawrence Fox, *Dan's World: A Free Enterprise Dream; An Ethics Nightmare*, 55 BUS. LAW. 1533 (2000). Elsewhere, I have suggested that large, elite corporate law firms have market power in demanding equity in their clients. See Puri, *Taking Stock of Lawyers Taking Stock as Legal Fees*, *supra* note 67.

product, but may not have entered into a contractual relationship with it. Unsophisticated retail investors and sophisticated institutional investors who, in making investment decisions, rely on the contents of a prospectus prepared by legal counsel for the issuer are not clients of the law firm and would not be able to sue on the basis of a breach of contract claim.¹⁰⁰ As a result, their recourse would be limited to an action in negligence, and if successful, they would only be able to recover against the negligent partners in an LLP firm.

On the other hand, claims involving sexual harassment, libel, slander, or torts other than negligence are not covered by the LLP shield in first wave LLP statutes. Thus, all partners remain personally liable in situations involving, for example, breach of a lease, employee discrimination and sexual harassment. The policy rationale for limiting liability only with respect to negligence claims may be a response to the recent judicial expansion of duties owed to third parties in tort.¹⁰¹

3. THE ROLE OF (MANDATORY) INSURANCE

Most jurisdictions in the United States that allow for the formation of LLPs do not require that law firms maintain minimum levels of liability insurance coverage. Ontario's LLP legislation requires that firms wishing to practice as LLPs must carry liability insurance, but allows the relevant self-governing body for the professional group to establish the minimum level.¹⁰² The Law Society has established the mandatory minimum liability insurance coverage for firms established as LLPs at one million dollars for each member of the firm.¹⁰³ This is the same minimum mandated for any lawyer practicing in Ontario as a sole-practitioner or as a member of a general partnership.¹⁰⁴ It is surprising that the minimum mandated level is no higher than the amount required to practice using a general partnership particularly given that consumers bear greater risk of loss when a firm is organized as an LLP.

Mandatory insurance alleviates many of the concerns associated with practice of law using LLPs.¹⁰⁵ It will only be a rare case where a liability claim exceeds partnership assets and liability insurance.¹⁰⁶ As well, many large firms carry

100. See *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, 182-85 (Can.).

101. But in *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 (Can.), the Supreme Court of Canada limits the expansion of duties owed to third parties under tort law.

102. See Partnerships Act, R.S.O., ch. P-5 (1990), amended by S.O., ch. 2, §44.2(b) (1998) (Ont.).

103. Law Society of Upper Canada Bylaw 26 § 1.

104. *Id.*

105. Kevin Davis, *Limited Liability Partnerships and the Economics of Mandatory Insurance*, 32 CAN. BUS. L.J. 51 (2000) See George M. Cohen, *Legal Malpractice Insurance and Loss Prevention: A Comparative Analysis of Economic Institutions* 4 CONN. INS. L.J. 305 (1997); Jett Hanna, *Legal Malpractice Insurance and Limited Liability Entities: An Analysis of Malpractice Risk and Underwriting Responses*, 39 S. TEX. L. REV. 641 (1998).

106. See Hanna, *supra* note 105, at 644.

much more than the minimum mandated insurance.¹⁰⁷ In jurisdictions where there is no minimum mandatory insurance or in circumstances where law firms are carrying more than the minimum mandated level of insurance, a law firm may engage in strategic behavior after converting to an LLP. After converting to an LLP, a law firm may then strategically reduce its existing level of insurance coverage, knowing that non-negligent partners will not be liable for any amount owing beyond insurance coverage and the partnership assets. An argument could be made that the level of insurance coverage will not be reduced *ex ante* because all partners are behind a veil of ignorance when making a decision about the appropriate level of insurance coverage; they do not know who will and who will not be negligent. However, this argument does not take into account the fact that partners, when making decisions about insurance coverage, know that they engage in practice areas that involve different levels of risks.¹⁰⁸ Those partners who practice in areas involving an above-average risk of loss will wish to maintain or increase existing levels of insurance coverage while those partners who practice in areas involving below-average risks will wish to decrease insurance coverage.

4. PIERCING THE LIMITED LIABILITY PARTNERSHIP VEIL

The doctrine of piercing the corporate veil has been created by the judiciary to overcome some of the unfairness and/or inefficiencies that may arise from a strict application of the rule of limited liability for shareholders of a corporation.¹⁰⁹ For example, courts have disregarded the corporate entity and imposed personal liability on shareholders in cases of non-compliance with statutory formalities and where representations of unlimited liability have been made.¹¹⁰ Courts are also more likely to pierce the corporate veil when dealing with closely-held corporations as opposed to widely-held corporations¹¹¹ and in circumstances involving tort rather than contract creditors.¹¹²

107. *Id.*

108. For example, in Ontario, real estate lawyers historically have been subject to higher risk of claims, although recently, more claims are being brought against litigation lawyers. See ANNUAL REPORT, Lawyers Professional Indemnity Company (1999) on its website, www.lpic.ca/annual_reports/1999/claims (last visited April 17, 2001.)

109. See Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036 (1991) [hereinafter Thompson, *Empirical Study*]; Robert B. Thompson, *Piercing the Veil Within Corporate Groups: Corporate Shareholders as Mere Investors*, 13 CONN. J. INT. L. 379 (1999) [hereinafter Thompson, *Shareholders as Investors*].

110. Cf. *C M Corp. v. Oberer Dev. Co.*, 631 F.2d 536 (7th Cir. 1980) (observing that "one of the primary purposes of the corporate form of business is to insulate shareholders from unlimited liability, and that the power to pierce the corporate veil should be exercised reluctantly and cautiously.").

111. See Thompson, *Empirical Study*, *supra* note 109, at 1041; Thompson, *Shareholders as Investors*, *supra* note 109, at 387.

112. See Thompson, *Empirical Study*, *supra* note 109, at 1042; Robert B. Thompson, *The Limits of Liability in the New Limited Liability Entities*, 32 WAKE FOREST L. REV. 1 (1997).

It is likely that the judiciary will extend the doctrine of veil piercing to firms that are organized as LLPs.¹¹³ Certainly, a firm that does not comply with notice requirements mandated by LLP legislation or the self-regulatory body for lawyers, such as including the letters “LLP” after its name or sending a letter advising existing clients of a change in liability rules, exposes its partners to the risk that a court will pierce the LLP veil and impose personal liability on non-negligent partners. Drawing both on the fact that courts are more likely to pierce the corporate veil in the context of closely-held corporations and the economic theory that it may be efficient to pierce the corporate veil in closely-held corporations, one can speculate that smaller law firms, (those with fewer partners), which are organized as LLPs are at higher risk of veil piercing by the judiciary than larger firms which have more partners. On this basis, it is not unreasonable to make the claim that the benefits of LLP legislation may accrue disproportionately to partners practicing in large law firms, thereby further separating the two hemispheres of lawyers.¹¹⁴

IV. THE CAMPAIGN FOR LLPs IN ONTARIO

Part IV analyzes the legislative process through which LLP statutes were enacted. An analysis of the legislative process and debates leading up to the implementation of LLPs in Ontario reveals three insights. First, professional interest groups used rhetoric and imagery about prevailing notions of individual blame over collective responsibility rather than reasoned arguments to convince the legislators to statutorily authorize LLPs. Second, professional interest groups were careful to present LLPs as a necessity for their entire profession, rather than factions of their profession. Finally, the particular structure of the legislation in Ontario suggests that only well-organized, financially strong professional groups will be able to wield their political power to have LLP legislation implemented in their favor.

A. HOW LLP LEGISLATION CAME INTO EFFECT IN ONTARIO

In the summer of 1998, the *Partnership Act* in Ontario was amended to allow for the formation of LLPs.¹¹⁵ The legislation was passed with almost no public debate. Only four months intervened between first and third reading of the bill. In fact, the first and second readings of the bill took place on the same day, a rare occurrence. Representatives from the relevant professional self-regulatory bodies

113. On veil piercing with respect to limited liability corporations, see Eric Fox, *Piercing the Veil of Limited Liability Companies*, 62 GEO. WASH. L. REV. 1143 (1994); John H. Matheson & Raymond B. Eby, *The Doctrine of Piercing the Veil in an Era of Multiple Limited Liability Entities: An Opportunity to Codify the Test for Waiving Owners' Limited Liability Protection*, 75 WASH. L. REV. 147 (2000).

114. See HEINZ & LAUMANN, *supra* note 10 for more on hemispheres of lawyers.

115. Partnerships Act, R.S.O., ch. P-5 (1990), amended by S.O., ch. 2 § 1 (1998) (Ont.).

made submissions. No individual or organization spoke on behalf of consumers of professional services. All three major political parties were in favor of the legislation, and there was no opposition to the bill.¹¹⁶

1. RHETORIC AND IMAGERY RATHER THAN REASON

Representatives from the chartered accountancy profession (C.A.s) made submissions to the Standing Committee on the Administration of Justice. Rather than presenting reasoned arguments and analysis about the public and private benefits and costs of limited liability, they instead used imagery and rhetoric of the prevailing ideology of individual responsibility. They also attempted to project themselves as ordinary people with the kind of real problems faced by other citizens of Canada. For example, a C.A. partner from the Kitchener-Waterloo office of a national firm pleaded:

I have no problem taking responsibility for my actions or my failure to act properly in conducting my work as an auditor, but . . . should I be responsible for the actions of each of my partners? . . . [s]hould my personal assets . . . be at risk?

Like many of you, I've worked very hard over my lifetime and I feel I work very hard every week. My wife doesn't work outside the home. In two years my son will be off to university and also wants to become a chartered accountant. Three years from now my daughter will be attending university. I am the primary support provider in our household.

Unfortunately, any large lawsuit where I was sued and my personal assets were at risk could cause significant hardship for my family. Would my children be able to attend university? I don't know. I could get to retirement at age 60 or 65 and have my net worth wiped out under the present situation where my personal assets are exposed as a result of a lawsuit, and this could happen even though I was not part of the engagement team.¹¹⁷

Despite the fact that the nuclear family is no longer the norm in Canada,¹¹⁸ that

116. This process (or lack thereof) is not dissimilar to the rapid pace at which LLP legislation was enacted in the United States without much public policy debate. See Hamilton, *supra* note 26.

117. *Proposed Partnerships Statute Law Amendment Act 1998: Hearings Before the Standing Committee on the Administration of Justice*, Ontario Legislative Assembly (May 12, 1998), available at http://www.ontla.on.ca/french/hansard/committee_debates/36_parl/session2/justice/j002.htm.

118. See Anne M. Milan, *One Hundred Years of Families*, 56 CANADIAN SOC. TRENDS 2 (2000) (documenting the trend away from the traditional nuclear family in the 20th century towards a more flexible definition of the family unit. "The last decades of the 20th century have brought greater individualism and more choice, giving rise to new living arrangements. This pattern of both change and continuity is likely to be a defining characteristic of families in the 21st century."); Susanne Kelman, *Redefining Family: History of Canadian Families 1900-2000*, 80 BEAVER 44 (Feb./Mar. 2000) (whereby the author attributes the following changes in family structure to the world wars, economic changes and conditions and to the birth-control pill: "Today, Canadians seem reluctant to enter into marriage and parenthood at all. The marriage rate is down; fertility has plummeted. Almost a quarter of adults in this country live alone. Almost 40 percent of marriages end in divorce.

in many cases it is a luxury for one partner in a marriage to stay at home,¹¹⁹ that there is government assistance for higher education,¹²⁰ that most citizens of Canada do not have sufficient income to save for retirement,¹²¹ the politicians were persuaded by these pleas. As one politician stated:

If this bill isn't put into place, what happens is that one of the partners who isn't directly involved with the service being provided could possibly lose his or her home, car, cottage and personal assets. This is frightening to anybody, considering what can happen in a litigated matter before the courts. By the time you get through the court proceedings a year or two later, *you lose your home, your boat, your car and the shirt off your back even if you win.* [Emphasis added.]¹²²

Single parents and common-law marriages no longer raise eyebrows."); YVES PERON, CANADIAN FAMILIES AT THE APPROACH OF THE YEAR 2000 (1999) (presenting an analysis examining over 30 years in the evolution of the structure and composition of Canadian and family households and living arrangements); Nicholas Bala, *The Evolving Canadian Definition of the Family: Towards a Pluralistic and Functional Approach*, 8 INT'L J.L. & FAM. 292, 312 (1994) ("[I]t is clear that the law has moved far from its traditional, morally based approach, where the family was considered only to be husband and wife, and any children they might have."); see generally MARGRIT EICHLER, FAMILY SHIFTS: FAMILIES, POLICIES AND GENDER EQUALITY (1997).

119. See generally EICHLER, *supra* note 118; *Behind the Times: Families Have Reinvented Themselves During the Last Three Decades, But Many of the Government Programs Aimed At Supporting Families Have Not*, CAN. & WORLD BACKGROUNDER, Mar. 1997, at 28-31 (documenting the rise in two income families and the difficulties associated therewith); Sandra Cordon, *Family Incomes Falling Despite Job Growth, Working More*, CANADIAN PRESS NEWSWIRE, Apr. 14, 1999, at 1 (indicating that the number of two-income households has skyrocketed from 30 per cent of Canadian families 30 years ago, to 70 percent today).

120. See David B. Perry, *Education Financing in Canada: An Update*, 43 CANADIAN TAX J. 222 (1995) (showing the distribution of spending between the provincial and local levels of government for post-secondary education); Maureen Donnelly et al., *Registered Education Savings Plans: A Tax Incentive Response to Higher Education Access*, 47 CANADIAN TAX J. 81 (1998) (discussing RESPs as a vehicle for paying the future costs of higher education with tax sheltered dollars); Human Resources Development Canada, at <http://www.hrdc.gc.ca/common/news/hrdb/99-44.shtml> (explaining the federal and the Ontario government's collaborative approach to financial assistance for postsecondary education including interest relief provisions. The site also stresses the importance of postsecondary education for the future of Canada and the government's dedication to this goal: "The Canada Student Loans Program (CSLP) is the largest single program in any country, providing over \$15 billion of financial assistance for over 2.7 million students since its inception in 1964."). See generally ROSS FINNIE et al., STUDENT LOANS IN CANADA: PAST, PRESENT AND FUTURE (1996).

121. See Cordon, *supra* note 121 (citing figures released by Statistics Canada that indicate "[f]amilies are working longer and harder, yet finding it increasingly difficult to get ahead . . . the standard of living of Canadians has fallen in the '90s, so we're no better off than we were 20 years ago"); Tracy LeMay, *Canadian Family Needs a Break: Incomes, Savings Falling as Spending, Debt Increases*, NAT'L POST, Jan. 19, 2000, at D4 (citing a study from the Vanier Institute of the Family that suggests the income drop experienced by families is the result of low average weekly wages, declining government transfers such as employment insurance, taxes and unemployment levels. The article also documents the difficulty Canadians are experiencing in saving for retirement); *Heart of the Matter: What is the Canadian Psyche Thinking About Retirement?*, BENEFITS CANADA, Oct. 1996, at 33-35 (suggesting that while Canadians are struggling to keep financially afloat, they are left with little time or money to think about and act on their retirement needs. The article also indicates that "nearly 70% of Canadians contributing to a pension plan don't believe they'll have enough to retire on based on their employer plan.").

122. *Proposed Partnerships Statute Law Amendment Act 1998: Hearings Before the Standing Committee on the Administration of Justice*, Ontario Legislative Assembly (May 6, 1998), available at <http://hansardindex.ontla.on.ca/hansardeissue/36-2/1008b.htm> (statement of Mr. Mike Colle).

An analysis of the submissions and responses above suggests that the prevailing ideology of individual blame over collective responsibility was central in the minds of both the professionals and the legislators.

2. "THIS IS NOT JUST A BIG FIRM, BIG CITY PHENOMENON" - PRESENTING A UNITED PROFESSIONAL FRONT

The self-regulatory bodies for the relevant professional groups were careful to present the image that LLPs were necessary for the entire profession, rather than predominately for the benefit of big firms.¹²³ David Wilson, the CEO of the Ontario Institute for Chartered Accountants, stated before the Standing Committee on Justice: "The act protects the 3,395 C.A.s who are partners in Ontario C.A. firms. It provides the same protection to partners in the 576 offices of local firms as those in the 194 offices of regional firms and those in the 64 offices of the so-called Big Six national firms."¹²⁴ As well, it seems that the three chartered accountants who made submissions before the Standing Committee on Justice were carefully selected to ensure representation of the profession: a partner from the Belleville office of a regional firm in eastern Ontario, a partner from the Sault Ste. Marie office of a firm with fifty-seven offices in Ontario, and a partner from the Kitchener-Waterloo office of a national firm that has fourteen offices in Ontario. Conspicuously absent was a partner from the Toronto office of a multi-national firm for whom the legislation is likely to be most valuable.

3. PROFESSIONAL POWER DETERMINES WHO DOES (AND DOESN'T) GET ACCESS TO THE LLP FORM OF BUSINESS ASSOCIATION

The Ontario legislation requires each professional association to approach the legislature to have their governing act amended so as to allow for their members

123. See Robert MacCrate, *A Nation Under Lost Lawyers: The Legal Profession at the Close of the Twentieth Century*, 100 DICK. L. REV. 587 (1996) (MacCrate suggests that the unitary concept of what it means to be a lawyer is a difficult one to maintain as a result of the very different practice settings and the different types of work in which lawyers are engaged and also documents the historical development of a unified identity for the legal profession); David B. Wilkins, *Special Issue Institutional Choices in the Regulation of Lawyers: Afterword: How Should We Determine Who Should Regulate Lawyers? - Managing Conflict and Context in Professional Regulation*, 65 FORD. L. REV. 465 (1996) (indicating that "the traditional claim that a uniform set of ethical rules and enforcement practices governs all lawyers in all context is both descriptively false and normatively unattractive"); Russell G. Pearce, *Law Day 2050: Post-Professionalism, Moral Leadership, and the Law-as-Business Paradigm*, 27 FLA. ST. U. L. REV. 9 (1999); Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229 (1995). For a response to Pearce, see Jeffrey W. Stempel, *Embracing Descent: The Bankruptcy of a Business Paradigm for Conceptualization and Regulating the Legal Professions*, 27 FLA. ST. U. L. REV. 25 (1999) (documenting the dangers of rejecting professionalism). See also Bryant G. Garth, *Independent Professional Power and the Search for a Legal Ideology with a Progressive Bite*, 62 IND. L.J. 183 (1987); David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 801 (1992).

124. *Proposed Partnerships Statute Law Amendment Act 1998: Hearings Before the Standing Committee on the Administration of Justice*, Ontario Legislative Assembly (May 6, 1998), available at <http://hansardindex.ontla.on.ca/hansardeissue/36-2/1008b.htm>.

to form LLPs. This regime does not appear to be very efficient, especially since there is limited space on the political agenda. It suggests that only relatively powerful professional groups will gain access to this new form of business association.

The chartered accounting profession was, in the summer of 1998, the first to have its legislation amended so as to allow for C.A. firms to form LLPs. At that time, the Minister for Consumer and Commercial Relations, the Honourable David H. Tsubouchi stated:

This government is taking a careful, measured approach to LLPs. For that reason, only chartered accountant firms may practice as limited liability partnerships for the time being. However, we will consider limited liability partnerships for other professions if their governing bodies can demonstrate a need for this type of organizational structure related to their work while at the same time protecting the interests of the Ontario consumer.¹²⁵

He added, "In the future, presumably these other professional organizations, whether it be the veterinarians, . . . the law society or the various health professions, could propose similar legislation as is being put forward by the Chartered Accountants."¹²⁶ In December 1998, the *Law Society Act* was amended to allow law firms to form LLPs.¹²⁷ The amendments allowing for the formation of LLPs were buried under a number of other significant amendments to the *Law Society Act*.¹²⁸ No discussion or debate took place in the legislature on the formation of LLPs for lawyers.

The Certified General Accountants, another professional group of accountants, also lobbied vigorously for an amendment to their governing legislation so as to allow their members to form LLPs. Ralph Palumbo, a senior member of the Certified General Accountants Association, of Ontario pleaded before the Standing Committee on the Administration of Justice:¹²⁹

125. *Proposed Partnerships Statute Law Amendment Act 1998: Hearings Before the Standing Committee on the Administration of Justice*, Ontario Legislative Assembly (May 6, 1998), available at <http://hansardindex.ontla.on.ca/hansardeissue/36-2/1008b.htm>.

126. *Id.*

127. An Act to Amend the Law Society Act, S.O. ch. 21 (1998) (Ont.).

128. See *supra* note 127. The other amendments were as follows: First, the amendments increased the number of public representatives on the law society's governing board. Second, the amendments improved the public complaint system by providing for the appointment of a new complaints resolution commissioner. Third, the amendments allow the law society to regulate not only the conduct of lawyers, but also the quality of services provided by lawyers. Fourth, the amendments clarified the definition of "incapacity" and permit the law society to issue remedial orders for treatment or counseling for lawyers suffering from a mental illness, alcohol or drug abuse. Fifth, the reforms gave the law society the clear legislative mandate it needs to thoroughly investigate complaints and require the cooperation of lawyers. Sixth, the law society has a range of new powers to protect the public where lawyers are acting improperly. Finally, the amendments streamline law society hearings and appeals and divert minor administrative infractions from the formal hearing process.

129. *Proposed Partnerships Statute Law Amendment Act 1998: Hearings Before the Standing Committee on the Administration of Justice*, Ontario Legislative Assembly (May 12, 1998), at http://www.ontla.on.ca/french/hansard/committee_debates/36_parl/session2/justice/j002.htm.

If certified general accountants in public practice are left out of Bill 6, how do we go back to our members and explain that the provincial government had decided that their competitors, the chartered accountants, are protected by the legislation while they are not? How do we tell them that their personal assets will continue to be subject to claims as a result of negligent acts of their partners while their competitors have no such worries? How does the government frankly defend that? All we're asking is that there be a level playing field. Our members are in the marketplace. They offer their services like other accountants and there's no good public policy reason to treat them any differently.

Despite their pleas, the certified general accountants ("CGAs") were unsuccessful in lobbying the government to allow them access to the LLP form of business association. The relative differences in power and influence between chartered accountants and lawyers on the one hand, and certified general accountants on the other, provides a forceful explanation of why the former groups were granted access to the legislation but the latter group was not.¹³⁰ Certified general accountants are less numerous, less influential and not as well organized as chartered accountants and lawyers.¹³¹ Additionally, certified general accountants have been in a battle with the chartered accountants over professional jurisdiction and territory. CGAs have for years unsuccessfully lobbied the Ontario government to allow them to conduct some of the functions (e.g., public audits) that are currently within the exclusive domain of chartered accountants. It is possible that the politicians may have made a calculated decision to deny the LLP form to CGAs so as to maximize their support from the CAs.

On the basis of the general theory of professional power advanced above, it is not difficult to predict which of the remaining professional groups in Ontario—medical doctors, dentists, veterinarians, real estate agents, hairstylists, and so on—will be successful in lobbying for access to the LLP form of business association in the future.

130. See John P. Heinz, *The Power of Lawyers*, 17 GA. L. REV. 891 (1983) (outlining various theories on professionalism and suggesting that professionals such as lawyers have acquired influential social power on the basis of their autonomy and specialized knowledge. What distinguishes occupations that achieve professionalism from those that do not is whether the individuals in such occupation can collect the resources necessary to persuade others that they deserve such status); Kenneth J. Lipartio & Paul J. Miranti, *Professions and Organizations in the Twentieth Century America*, 72 SOC. SCI. Q. 301 (June 1998) (suggesting that professionals, such as lawyers, engineers, and accountants, remain autonomous and powerful as a result of the close ties such professionals have forged with corporate organizations); see generally TERRENCE J. JOHNSON, *PROFESSIONS AND POWER* (1972); Bryant G. Garth, *Independent Professional Power and the Search for a Legal Ideology with a Progressive Bite*, 62 IND. L.J. 183 (1987).

131. Ontario has 13,000 CGAs and 8,000 CGA students. See Certified General Accountants of Ontario's website at <http://www.cga-ontario.org/newfiles/media/profile/profile.htm> (last visited April 18, 2001). Ontario has 28,800 CAs and over 3,300 CA students. See The Institute for Chartered Accountants of Ontario's website at <http://www.icao.on.ca/public/about/overview.html> (last visited April 18, 2001).

V. CONCLUSION

This Article has analyzed the gradual demise of liability in the law firm, and concluded that the private benefits conferred upon lawyers by LLPs are at the expense of consumers of legal services, particularly unsophisticated consumers. The greater likelihood of judicial veil piercing in the context of smaller law firms organized as LLPs means that the primary beneficiaries of LLPs will be partners practicing at large firms, thereby further separating the two hemispheres of lawyers. The advent of LLPs for lawyers also seems to be correlated with “eat what you kill” compensation trends, reflecting a more general trend of the commercialization of the legal profession. Given the strong political forces behind the implementation of LLPs, it is unlikely that such legislation will be repealed any time in the near future. Therefore, future analysis ought to focus on the impact on and relationship of LLPs to other changes in the structure and organization of law firms, and implications for what it means, or should mean, to be members of a profession and to be afforded attendant privileges.